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In The
Supreme Court of the United States

MIKE HATCH, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF MINNESOTA AND NOT AS AN INDIVIDUAL,

Petitioner,

v.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY BRIEF FOR PETITIONER

MIKE HATCH
Attorney General
State of Minnesota

KRISTINE L. EIDEN
Chief Deputy Attorney General

JEANNE M. COCHRAN
Assistant Attorney General
445 Minnesota Street
Suite 1100
Saint Paul, MN 55101-2128

MARGARET CHUTICH
Counsel of Record
Assistant Attorney General
445 Minnesota Street
Suite 900
Saint Paul, MN 55101-2127
(651) 296-2418

JESSICA A. PALMER-DENIG
Assistant Attorney General
445 Minnesota Street
Suite 900
Saint Paul, MN 55101-2127

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY FOR PETITIONER

This case presents novel and critical questions regarding the scope of States' rights, as specifically preserved by Congress pursuant to 47 U.S.C. § 332(c)(3)(A) ("Section 332"), to enact laws to protect wireless customers in this country from unfair business practices. These federal questions are ripe for review and the Court's decision will impact the ability of all fifty States to protect the more than 184 million wireless customers in the United States from unscrupulous business practices. Respondents' Brief in Opposition cannot mask the exceptional importance of the questions presented and the need for immediate review.

The Court of Appeals decided these important questions in a manner clearly contrary to Congress's intent and the plain language of Section 332, when it concluded that States are without authority to require consent to, or even prior notice of, substantive wireless contract changes. *See* Pet. 21-28. The Court of Appeals then went beyond the specific issues before it, strongly suggesting that States are without authority to enact wireless-specific consumer protection laws of *any type*. *See* Pet. 14.

Respondents' claim that the issues presented here are not worthy of review defies logic. Likewise, Respondents' claim that wireless customers are "extraordinarily" satisfied and have no need for state consumer protection measures is baseless.

Thirty-six States and six national consumer groups have filed amici curiae briefs urging this Court to grant the petition. The participation of amici in this case soundly refutes Respondents' position that this case presents no issues of national importance. Almost three-quarters of the

States ask this Court to recognize that the Court of Appeals' decision directly and erroneously denies the States their sovereign right, as preserved by Congress, to protect citizens from the unfair business practices of the wireless industry. *See* Amici Br. of Michigan, *et al.* at 5-8, 19-20. Similarly, the amici brief of the six national consumer groups confirms that consumers face pervasive problems in their dealings with wireless providers and that States must have the authority to prevent abuses by providers. *See* Amici Br. of AARP, *et al.* at 9-14. This Court's immediate intervention is necessary to remedy the Court of Appeals' erroneous interpretation of Section 332.

I. The Questions Presented Are Of Extraordinary National Importance And Should Be Reviewed Immediately.

A. A Split In Authority Is Not A Prerequisite For Review By This Court.

A pressing need exists for this Court to review the extraordinarily important question of the scope of States' rights to protect wireless customers as preserved by Congress under Section 332. The immediacy of this need far outweighs Respondents' suggestion that this Court should wait to review the questions presented until some unknown date when a split in authority develops, if one develops at all.[1] A split in authority, however, is not a

[1] Petitioner does not assert a conflict among the circuits because no other circuit court has decided the novel questions presented here. The Eighth Circuit's *analysis* of the scope of preempted state regulation of "rates charged" in Section 332, however, conflicts in principle with the Seventh Circuit's analysis of that same issue. In *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1074 (7th Cir. 2004), the Seventh Circuit held that claims involving laws of general applicability that do not

(Continued on following page)

prerequisite to review by this Court. Sup. Ct. R. 10. Where, as here, a court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, the Court clearly has discretion to grant review of the decision below. *Id.*

This Court should not defer consideration of the questions in this case until other lower courts have ruled. Indeed, it is possible that a split in authority may never exist, as the erroneous ruling of the Eighth Circuit may be relied upon by courts throughout the country, resulting in a Pac-Man-like consumption of States' rights. In fact, wireless providers have already used the decision below in a case currently pending before the Eleventh Circuit to argue for preemption of state measures governing the use of line-items on bills (including taxes and regulatory fees). *See* Br. of Wireless Industry Intervenors in Support of Respondent, *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, No. 05-11682-DD (11th Cir. Jan. 12, 2006) (petition for review of declaratory ruling portion of *Truth-in-Billing and Billing Format*, 20 FCC Rcd. 6448 (2005)); *Vt. Pub. Serv. Bd. v. FCC*, No. 05-12601-DD (11th Cir. Jan. 12, 2006) (same). As confirmed by thirty-six States and six national consumer organizations, a determination by this Court is needed now.

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require a court to assess the reasonableness of rates charged do not involve preempted state regulation. If the Eighth Circuit had applied similar reasoning to the Act, it would have found that the Act is not preempted by 47 U.S.C. § 332(c)(3)(A); nothing in the Act allows the State to assess the reasonableness of the amount charged. Pet. 21-28.

B. This Case Presents Issues Of Immense National Significance.

Respondents' efforts to minimize the significance of the Eighth Circuit's decision fail entirely. First, Respondents assert that it is uncertain how other lower courts will interpret and apply the decision. Yet, uncertainty regarding the application of any recent court of appeals decision by other courts exists in every case before review by this Court; such feigned uncertainty should not stop this Court from concluding that the Court of Appeals' decision is of national importance. *See Clingman v. Beaver*, 544 U.S. 581, 586 (2005) (granting petition where a court of appeals decision "casts doubt" on the laws of twenty-three other States).

Second, as highlighted by a recent United States district court decision, the Eighth Circuit's reasoning not only calls into question the right of States to enact wireless-specific consumer protection laws, *but also* impacts the authority of the States to enact laws targeted at *landline* telecommunications carriers. *See OCMC, Inc. v. Norris*, No. 4:06-CV-00069, 2006 WL 1070954, at *9 (S.D. Iowa Apr. 24, 2006) (discussing the argument of a long distance carrier that the decision below supports federal preemption of a state consumer protection law applicable to landline telecommunications carriers because it is not a law of general applicability).

Third, Respondents' astounding claim that review is unnecessary because "customer satisfaction with wireless service is extraordinarily high," Br. in Opp'n 15, is completely unfounded and ignores abundant evidence to the contrary. Respondents' argument is based *solely* on the number of wireless complaints received by the Federal

Communications Commission ("FCC") *in one three-month period* in 2005. Respondents fail to mention that only a miniscule portion of all customers with complaints even know to contact the FCC, and a decline in *complaints* to one agency in one three-month period does not demonstrate wireless customers are "extraordinarily" satisfied with their service. *See* C.A. App. 0435 (AARP 2003 Wireless Telephone Study). To the contrary, a wealth of evidence demonstrates that wireless customers continue to face widespread problems with their wireless providers. *See* Amici Br. of AARP, *et al.* at 9-13; Pet. 2-5. *See also,* Press Release, Michigan Office of the Attorney General, *available at* http://www.michigan.gov/ag/0,1607,7-164-34739-143440-,00.html (last visited May 16, 2006) (stating cell phone complaints to the Michigan Attorney General are up fifty percent from 2005). The participation of thirty-six States and six national consumer groups as amici demonstrates that wireless customers continue to face problems and need the States to provide remedies.

Similarly, the undisputed facts completely refute the Respondents' claim that wireless companies do not unilaterally change wireless contracts. Testimony of Minnesota wireless customers before the Minnesota Legislature and filed with the district court is clear: wireless companies in Minnesota frequently extended contracts or added new fees *without notice to* or *consent of* the customer. *See, e.g.,* C.A. App. 0304-06, 0322-24, 0333, 0361, 0423-24.

Respondents' claim that customers already have adequate remedies to combat these unfair practices is equally unpersuasive. Contrary to Respondents' assertion, switching providers is not an effective remedy for customers whose contracts are extended without their consent. Like Minnesota citizen John Povejsil, such customers are

trapped in their contracts unless they pay the termination fees demanded by the company. *See* C.A. App. 0335-36. Similarly, filing a lawsuit in state court alleging violations of laws of general applicability is not an effective remedy for a customer in this unfortunate situation. It is simply not cost effective to hire a lawyer for the amount at issue. *See id.* Likewise, filing a complaint with the FCC has proven to be a meaningless remedy for consumers. *See* Amici Br. of AARP at 13-14.

Finally, Respondents themselves have conceded in the past that this case presents critical issues of national importance. Joint Mot. for a Stay Pending Appeal of the Dist. Ct.'s Partial Dissolution of its TRO at 1, *Cellco P'ship v. Hatch*, 431 F.3d 1077 (8th Cir. 2004) (No. 04-3198) (stating "[t]his case presents critical questions of first impression in this Circuit . . . "; requesting the court "to maintain the status quo pending resolution of this issue of national importance, . . . "). Indeed, little doubt exists that if the Court of Appeals had reached the opposite conclusion and correctly found that the Act is not preempted by federal law, Respondents themselves would be seeking review by this Court.

II. The Petition Is Timely.

Respondents also contend that the Court should deny review because this case is a "flawed vehicle." Br. in Opp'n 18. This contention is meritless.

First, the Respondents erroneously assert that the sunset provision in the Act negates the need for review. The Act is not scheduled to sunset until August 1, 2007. If the Court were to grant the petition, the Minnesota Legislature would have the full 2007 session to extend or

to repeal the sunset in the Act. Minnesota's legislature is fully capable of extending a statute's sunset date. *See, e.g.*, 2005 Minn. Laws, 1st Spec. Sess., ch. 1, art. 2, § 20 (extending sunset for off-road vehicle damage accounts). If the Court grants the petition, the Court will certainly have sufficient time to issue its opinion before August 1, 2007. The Court's decision will provide Minnesota, other States, and the lower courts across the country the guidance that they desperately need regarding the line between permissible state regulation of "terms and conditions" of wireless service and impermissible state regulation of "rates charged."

Second, Respondents cite two bills introduced in the Minnesota Legislature to argue that the Act may be "legislatively superseded." Br. in Opp'n 19. Respondents fail to inform this Court that neither bill made it out of committee, even though the committee deadlines have long since passed. *See* Minnesota Legislature website, *available at* http://www.leg.state.mn.us/ (last visited May 16, 2006) (providing the status of Minnesota H.F. 2983 and S.F. 2988). Further, the legislative biennium is set to end on May 22, 2006, making it highly improbable that the Act will be superseded by either of these bills. *See id.*; Minn. Const. art. IV, sec. 12.

Third, Respondents' argument that this Court should deny review because further proceedings might be necessary is particularly stunning. *Nowhere* is it required that a case may only be heard by this Court if it is a full and final resolution of all issues in a case. This Court, like all appeals courts, often decides cases in which remand is warranted to allow consideration of additional issues. *See, e.g.*, *Marshall v. Marshall*, 547 U.S. ___, 126 S. Ct. 1735 (2006); *Ayotte v. Planned Parenthood*, 546 U.S. ___, 126

S. Ct. 961 (2006); *Lincoln Property Co. v. Roche*, 546 U.S. ___, 126 S. Ct. 606 (2005); *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656 (2004).

III. Congress Did Not Intend To Preempt Wireless-Specific Laws Like The Act.

The Court of Appeals erroneously found the Act is preempted by Section 332 without making the requisite finding that it was Congress's "clear and manifest" intent to preempt such a law. Pet. 21-29. Respondents, like the Court of Appeals, blatantly ignore the required presumption against preemption.

Moreover, there is not a single piece of legislative history that shows that Congress intended to adopt an exceedingly broad definition of the scope of preemption of state regulation of "rates charged." In fact, the legislative history of 47 U.S.C. § 332(c)(3)(A) evidences Congress's intent to give a narrow meaning to "rates charged" and preserve broad state authority over "other terms and conditions" of wireless service, including consumer protection matters:

> By "terms and conditions," the Committee intends to include such matters as customer billing information and practices and billing disputes and *other consumer protection matters*; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. *This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions."*

H.R. Rep. No. 103-111, at 261 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 588 (emphasis added).

The Respondents also continue to argue that the length of the contract is a "rate charged" within the meaning of Section 332, citing this Court's decision in *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 223 (1998). The Court's discussion of rate regulation in *Central Office* is readily distinguishable from the circumstances discussed in this case. In *Central Office*, this Court discussed the term "rates" in relation to the filed-rate doctrine and 47 U.S.C. § 203, which includes much more expansive language than that at issue in 47 U.S.C. § 332(c)(3)(A). Section 203(c) makes it unlawful for a telephone company to "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified" in a tariff filed with the FCC. This Court explained that the language used in that section necessarily included not just "charges" but "the classifications, practices, and regulations affecting such charges," that is other terms and conditions. *See Central Office*, 524 U.S. at 223. In contrast, however, Congress used plain language in Section 332 to specifically distinguish between "rates charged by" wireless providers and "other terms and conditions." Therefore, *Central Office* is entirely inapplicable to this case. The Court of Appeals erred when it preempted the Act, and its decision must be reversed.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota

KRISTINE L. EIDEN
Chief Deputy Attorney General

JEANNE M. COCHRAN
Assistant Attorney General
445 Minnesota Street,
Suite 1100
Saint Paul, MN 55101-2128

MARGARET CHUTICH
Counsel of Record
Assistant Attorney General
445 Minnesota Street,
Suite 900
Saint Paul, MN 55101-2127
(651) 296-2418

JESSICA A. PALMER-DENIG
Assistant Attorney General
445 Minnesota Street,
Suite 900
Saint Paul, MN 55101-2127

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